



### ISSUES

1. What is the nature and extent of claimant's injuries and disability? The ALJ awarded claimant a 15 percent whole person functional impairment for the injuries to her low back, after deducting 5 percent for claimant's pre-existing functional impairment. Respondent argues that the opinion of board certified orthopedic surgeon Edward J. Prostic, M.D. is the most credible and claimant should be limited to a 14 percent whole person functional impairment, from which a 9 percent pre-existing impairment should be deducted, leaving a 5 percent whole person impairment as the final award. Claimant contends that the award of the ALJ should be affirmed.

### FINDINGS OF FACT

Claimant works for the State of Kansas, at Kansas Neurological Institute (KNI). In September and October 1995, while claimant was working for another state agency, she sustained work-related injuries involving her wrists and her low back. On January 13, 1997, claimant was examined by Peter V. Bieri, M.D., for the purpose of providing an impairment rating. Dr. Bieri is board certified in disability evaluation. Claimant was awarded a 5 percent whole person impairment for specific disorders of the lumbar spine based on the Third Edition Revised of the *AMA Guides*. An additional 4 percent whole person impairment was awarded for range of motion deficits. The combined whole person impairment of the lumbar spine was 9 percent. That 1995 case settled in 1997. On March 21, 2011, the parties deposed Dr. Bieri in this matter. During the deposition, Dr. Bieri agreed that the rating provided from the 1997 examination would have been the same, regardless of whether the Third Edition Revised was used or the Fourth Edition. The percentage of impairment would be the same under either version.

On January 15, 2010, claimant slipped and fell on an icy sidewalk. Claimant was walking on the KNI premises when this accident occurred. As a result of that fall, claimant's lower back was again injured. This made her back condition worse than before because she was now experiencing pain going down both legs. Claimant reported her injury to respondent.

Claimant was referred to board certified occupational medicine specialist Donald T. Mead, M.D., a physician at St. Francis Health Center. Dr. Mead treated claimant, ultimately referring her to Dr. Michael Smith, a surgeon. Dr. Smith referred claimant for physical therapy. In part due to the pain going down into her legs, Dr. Smith recommended that claimant have back surgery. However, claimant did not want surgery testifying, "I just didn't want to go there."<sup>2</sup> Claimant did not have back surgery. At the time of the regular hearing, claimant was back to work.

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<sup>2</sup> R.H. Trans. at 12-13.

Dr. Mead found claimant to be at maximum medical improvement (MMI) on September 2, 2010. Dr. Mead rated claimant as having a 20 percent permanent partial impairment to the body as a whole, with 5 percent being preexisting. The permanent impairment attributable to the January 15, 2010, injury would be 15 percent. This permanent impairment of function rating is based on the Fourth Edition of the *AMA Guides*.<sup>3</sup> In determining claimant's final rating, Dr. Mead had the opportunity to review both prior x-rays from 1995 and more recent x-rays from Stormont Vail Hospital taken after the January 15, 2010 accident, which Dr. Mead described as being more detailed, including both flexion and extension on the films. The Stormont Vail films supported his determination of a five millimeter transition.

Dr. Mead concluded that claimant would fit into a DRE IV, 20 percent whole person impairment rating, with a 5 percent credit for DRE II impairment that Dr. Bieri found in January 1997 from claimant's prior accident.

At the request of her attorney, claimant was seen by board certified orthopedic surgeon Edward J. Prostic, M.D., on October 1, 2010. Dr. Prostic rated claimant as having a 14 percent impairment to the body as a whole (low back impairment), attributable to the January 15, 2010 accident and resulting injury. This was also in accordance with the Fourth Edition of the *AMA Guides*. However, while Dr. Bieri used the DRE method of rating claimant's impairment, Dr. Prostic used the Range of Motion method. Dr. Prostic testified that claimant had loss of motion segment integrity, indicating instability. Dr. Prostic did not have the benefit of x-rays or MRI films to review prior to making his determination. He acknowledged that having some diagnostic films would have been better for purposes of diagnosing loss of motion segment integrity than using speculation. Plus, Dr. Prostic provided no pre-existing functional impairment opinion as claimant told him that she had healed completely from the previous injury.

Respondent requested that the ALJ take judicial notice of the file in docket # 206,117. The ALJ agreed, over the objection of claimant's attorney, advising that he wanted that information in the record. Respondent's attorney was advised to submit the records.<sup>4</sup> However, this file contains no information from that docketed case. While it would be appropriate for the Board to consider any information offered into evidence and/or considered by the ALJ, it is not proper for the Board to consider information not considered by the ALJ. Therefore, the information in docket # 206,117 was neither reviewed, nor considered by the Board in the determination of this matter, with the exception of the information provided during the deposition of Dr. Bieri.

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<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>4</sup> R.H. Trans. at 5-6.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

It is unusual for a respondent to argue in favor of a range of motion opinion from Dr. Prostic and against a DRE medical opinion from it's own expert. Nevertheless, that is the situation herein. In this instance, the range of motion opinion of Dr. Prostic resulted in a lower functional impairment rating than the DRE opinion from Dr. Mead. However, the Board cannot make it's determination on which rating provides the most or least benefit to the parties. The determination must be made based on the credibility of the evidence in the record.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>8</sup>

Here, the Board finds the opinion of Dr. Mead to be the most credible. Dr. Mead had the opportunity to review x-rays from both the 1995 accident and from the 2010 accident. Dr. Prostic was not provided x-rays to review, either current or past. The x-rays before the January 15 accident showed normal alignment of claimant's lumbar spine. However, the x-rays after the date of accident confirm loss of motion segment integrity of 5 millimeters, which was the basis for the DRE IV rating. Therefore, the Board finds the 20 percent functional impairment rating of Dr. Mead to be the most credible.

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<sup>5</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 44-501(a).

<sup>8</sup> K.S.A. 44-510e(a).

K.S.A. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>9</sup>

Claimant contends there was no credible pre-existing functional impairment. However, the deposition evidence from Dr. Bieri counters that argument. While the original functional impairment was pursuant to the AMA Guides, Third Edition Revised, Dr. Bieri testified that the 5 percent pre-existing functional impairment would not vary with the consideration of the *AMA Guides*, Fourth Edition. The Board finds that respondent has satisfied its burden of proving the existence of a pre-existing functional impairment.<sup>10</sup> The Award shall be reduced accordingly. The Award of a 15 percent permanent partial whole person functional impairment is affirmed.

#### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated May 24, 2011, should be, and is hereby, affirmed.

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<sup>9</sup> K.S.A. 44-501(c).

<sup>10</sup> *Hanson v Logan U.S.D.* 326, 28 Kan. App. 92, Syl. # 5, 11 P.3d 1184 (2000).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge